88-1658

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

LOUISBURG GRAIN CO.,INC.,
A. SCOTT ANDERSON
AND E. SYLVIA ANDERSON, Petitioners,

v.

CITY OF ARKANSAS CITY, KANSAS, CITY OF HESTON, KANSAS, AND SOUTHWEST NATIONAL BANK, WICHITA, KANSAS, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

Paul Hasty, Jr.
Thomas D. Billam
WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHTD.
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000

Counsel for Petitioners

March 17, 1989

10 pp

QUESTION PRESENTED

1. Did the Kansas Supreme Court, by exceeding its scope of review and the scope of the Petition for Review filed by Respondents, deny the 5th and 14th Amendment Due Process rights of Petitioners, in reversing and finding fraudulent a conveyance between Petitioners?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioners, A. Scott Anderson, E. Sylvia Anderson, and Louisburg Grain Co., Inc.; Respondents were City of Arkansas City, Kansas, City of Heston, Kansas and Southwest National Bank, Wichita, Kansas. K-M Land Company was a separate appellee in the Kansas Court of Appeals and the Kansas Supreme Court, regarding the issue of whether a transfer from the Andersons to K-M Land Company was fraudulent; that issue is not addressed in this Petition, *per se*, and K-M Land Company is not named as a party herein.

The Respondents before this Court include all three Respondents below.

Petitioner Louisburg Grain Co., Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

LOUISBURG GRAIN CO., INC.,
A. SCOTT ANDERSON
AND E. SYLVIA ANDERSON, Petitioners,

v.

CITY OF ARKANSAS CITY, KANSAS,
CITY OF HESTON, KANSAS,
AND SOUTHWEST NATIONAL BANK,
WICHITA, KANSAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

Petitioners Louisburg Grain Co., Inc., E. Sylvia Anderson and A. Scott Anderson respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Kansas Supreme Courtin the denial of rehearing, entered December 20, 1988, of its original opinion issued October 3, 1988.

OPINIONS BELOW

The opinion of the Kansas Supreme Court issued October 3, 1988, is reported as *City of Arkansas City v. Anderson*, 243 Kan. 627 (1988).

The Motion for Rehearing and Reconsideration was filed by these petitioners as appellees on October 24, 1988, which Motion is attached in the Appendix hereto, at p. A-11, *infra*. On December 20, 1988, the Kansas Supreme Court denied the Motion for Rehearing, without opinion. That one-page denial is included in the Appendix hereto, at p. A-44, *infra*.

JURISDICTION

The final judgment of the Kansas Supreme Court was entered October 3, 1988. A Motion for Rehearing and Reconsideration was filed by Petitioners October 24, 1988, and the federal question was raised at pages 6-8. That motion was denied by the Kansas Supreme Court on December 20, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), because a right, title, privilege or immunity of the petitioners was raised in the motion for rehearing, i.e., the Due Process rights of Petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

(1) The 5th Amendment of the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law.

(2) The 14th Amendment of the United States Constitution provides, in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law.

STATEMENT OF CASE

Respondents filed suit in Johnson County (Kansas) District Court, claiming that several conveyances were fraudulent, among them one by the Andersons to Louisburg Grain Company, Inc. and one by the Andersons to K-M

Land Company. The Respondents claimed at the trial level that the conveyances were designed to thwart collection of judgments against the Andersons rendered in other district courts in Kansas. Trial to the court occurred, in two separate hearings, resulting in a 10-page memorandum decision on November 21, 1986, against Respondents and in favor of Petitioners and K-M Land Company, finding no fraud in either conveyance. Respondents appealed the trial court opinion, but the Kansas Court of Appeals affirmed the trial court in an unpublished opinion March 3, 1988.

By a Petition for Review to the Kansas Supreme Court, Respondents sought review only of the conveyance by the

Andersons to K-M Land Company. The Kansas Supreme Court accepted the review, and reversed and remanded with instructions that findings of fraud be entered as to both conveyances, *City of Arkansas City v. Anderson*, 243 Kan. 627 (October 3, 1988).

The Kansas Supreme Court reversed the entire trial court decision, even though Respondents had specifically sought review only of the K-M Land Co. conveyance, and not the Louisburg Grain Co. conveyance. (See page 10 of Respondents' Petition for Review, Appendix A1-A2.)

Petitioners moved the Kansas Supreme Court for a rehearing and/or reconsideration, raising at pages 6-8 of the Motion, the issue that the Louisburg

Grain Co. conveyance was not before the Court, and that the Kansas Supreme Court should reconsider its reversal of the Louisburg Grain Co. conveyance. Petitioners argued that any consideration by the Kansas Supreme Court of `the Louisburg Grain Co. conveyance would be beyond the scope of review. In effect, petitioners stated that reversal mandated a finding of fraud on both conveyances, when the Louisburg Grain Company conveyance was not briefed or argued to the state court, resulting in a denial of due process to the Andersons and Louisburg Grain Co., Inc.

No oral arguments were permitted, and the Kansas Supreme Court denied the motion for rehearing with a one-line memorandum of December 20, 1988.

REASONS FOR GRANTING THE WRIT

Petitioners submit that in this case the Kansas Supreme Court wholly denied the Due Process rights of the Andersons and Louisburg Grain Co. by exceeding its scope of review and mandating the finding that a conveyance was fraudulent, when the conveyance was not properly on review. That determination by the Kansas Supreme Court, by mandate, required the trial court to void the conveyances to K-M Land Company, and to Louisburg Grain Company, Inc., by ordering the reconveyance of the land interests. This is, without doubt, a deprivation by the State of the property owned by Louisburg Grain Co., Inc., without any opportunity to contest the

same. It also subjected the property to attachment by Andersons' creditors. For these reasons, the Writ of Certiorari should be granted to consider the Kansas Supreme Court determination.

Appeals in Kansas are granted by statute, K.S.A. 60-2101, *et seq.*, and governed by rules promulgated by the Kansas Supreme Court. Issues to be decided on appeal must be included in the Docketing Statement (Rule 2.041) and fully briefed (Rule 6.02). An issue or question is considered abandoned on appeal when it is not raised and not argued, even though incidentally mentioned in the brief of a party. *Brubaker v. Branine*, 237 Kan. 488, 490, 701 P.2d 929 (1985).

When the Kansas Supreme Court grants a petition to review a decision by the Kansas Court of Appeals (Rule 8.03), the Kansas Supreme Court has the jurisdiction to hear on appeal, and the authority to determine, those appropriate issues that are presented on appeal. *Johnson v. Kansas Neurological Institute*, 240 Kan. 123, 727 P.2d 912 (1986). When the Supreme Court raises an issue *sua sponte*, counsel for all the parties should be afforded a fair opportunity to brief the new issue and present their positions to the court. *Id*, at 127.

Without that fair opportunity to brief a new issue and to present the position of each party, those parties are denied Due Process when an interest

in property is involved. The guarantee of procedural Due Process embodies a presumptive requirement of notice, and a meaningful opportunity to be heard, before the State may act finally to deprive a person of his property. *Barnes v. Kansas Department of Revenue*, 238 Kan. 820 (1985), *appeal dismissed*, 107 S.Ct. 310. Further, when state legislation has provided the right of an appeal, the minimum essential elements of Due Process of law in an appeal affecting a person's life, liberty or property, are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Atkinson v. Board of Education, U.S.D. 383*, 235 Kan. 793, 684 P.2d 424 (1984).

In this case, the only question presented to the Kansas Supreme Court in the Petition for Review, filed by Respondents, was the validity of the conveyance by the Andersons to K-M Land Company. At page 10 of the Petition for Review, Respondents specifically advised the Court:

> It should be noted that while the trial of this matter also concerned a conveyance to Louisburg Grain Co., another Anderson owned and controlled corporation, the appeal and indeed this petition for review concerns solely the K-M Land Company transfer.

Because Respondents did not request a review of the Louisburg Grain Co. conveyance, Petitioners did not address that matter in their Response, a four-page memorandum that addressed only

the proper scope of review regarding substantial competent evidence. (Response by Appellees to Appellants' Petition for Review, Appendix, pp.A-4 -- A-10.)

Nonetheless, the Kansas Supreme Court accepted the review, and went much further than requested in the Petition for Review. As stated above, the Kansas Supreme Court took it upon itself to determine not only whether there was substantial competent evidence upon which the trial court could have based its decision of no fraud in either conveyance, but also the Kansas Supreme Court went further and determined there was substantial evidence to support findings that both conveyances were, indeed, fradulent. This was not only an improper scope of review, but was a

review of the Louisburg Grain Co. conveyance after the Kansas Supreme Court had been notified by Respondents that they were not seeking such a review.

When the Kansas Supreme Court decided, *sua sponte*, to raise the issue of the validity of the Louisburg Grain Co. transfer, all parties should have been given the opportunity to brief that issue fully and to present their positions to the Court. *Johnson v. Kansas Neurological Institute*, 240 Kan. at 127. Because the Kansas Supreme Court did not grant any such opportunity to the parties, they were denied their Due Process rights.

The issue was raised by Petitioners, in their Motion for Rehearing and Reconsideration, but to no avail. The Kansas Supreme Court was specifically

advised, at pp. 6-8 of the Petitioners' Motion for Rehearing

(Appendix, pp. A-24 - A-28), that there was no attack or argument by the Respondents below concerning the trial court's determination that the transfer of land from the Andersons to Louisburg Grain Co., Inc. was not fraudulent. The only arguments by Respondents below in their brief to the Kansas Court of Appeals relate to the conveyance of land from defendants Anderson to K-M Land Company.

Despite the fact that the Louisburg Grain Co. conveyance from the Andersons was not argued to the Kansas Court of Appeals, and was specifically excluded in the Petition for Review, the Kansas Supreme Court noted in its opinion, at page 630, that the Louisburg Grain Co.

conveyance "is a second conveyance in issue here."

Petitioners note to the Court that there was no opportunity for Petitioners to raise this Due Process issue earlier, and no reason to do so. Petitioners had been the prevailing party at the trial court level, and at the intermediate appellant court level, the Kansas Court of Appeals. Both of those courts had determined that there was no fraud involved in either of the conveyances. The very first opportunity to raise this Due Process argument, the federal question, was in the Motion for Rehearing, and Petitioners did so. When a party raises the federal question at the first available opportunity, this Court does have jurisdiction under 28 U.S.C. §1257(3).

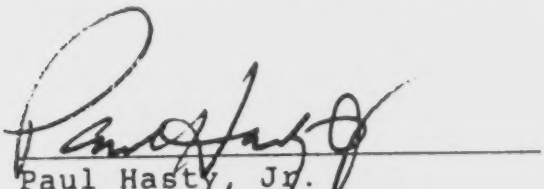
See, e.g., *Brinkerhoff-Faris Trust Company v. Hill*, 281 U.S. 673-677 (1930); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155-159 (1980).

In summary, Petitioners assert that the Kansas Supreme Court review denied the Due Process rights of Louisburg Grain Co. and the Andersons by raising an issue, *sua sponte*, of the transfer to Louisburg Grain Co., upon which no review had been requested. Without an opportunity to be heard on this particular conveyance, Louisburg Grain Co. and the Andersons lost property rights by the unwarranted reversal of the entire trial court determination, by the decision of the Kansas Supreme Court.

CONCLUSION

The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,



Paul Hasty, Jr.
Thomas D. Billam
WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHTD.
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000

Counsel for Petitioners

March 17, 1989

APPENDIX

PETITION FOR REVIEW
FILED BY RESPONDENTS

March 22, 1988
(only p. 10 is reproduced)

ARGUMENT AND AUTHORITIES

I.
THE COURT OF APPEALS ERRED IN SUSTAINING THE TRIAL COURT'S APPLICATION OF THE BURDEN OF PROOF REGARDING FRAUDULENT CONVEYANCES TO THE CONVEYANCE OF LAND FROM DEFENDANTS ANDERSON TO DEFENDANT K-M LAND COMPANY, INC.

The essence of plaintiffs' claim is that defendants Anderson fraudulently conveyed land held personally to K-M Land Company, Inc., a corportion wholly owned by the Andersons and created solely for the purpose of holding the land. It should be noted that while the trial of this matter also concerned a conveyance to Louisburg Grain Co.,

another Anderson owned and controlled corporation, the appeal and indeed this Petition for Review concerns solely the K-M Land Company transfer.

The law is clear that conveyances of land made with intent to hinder, delay or defraud creditors for their just and lawful debts and damages shall be deemed utterly void and of no effect. K.S.A. §33-102. The trial court, after reviewing substaintial evidence in this case, concluded that the intent of the defendants was unknown. Based upon this finding, the trial court concluded that plaintiffs had not met their burden of proof, and found for defendants. The Court of Appeals affirmed this application of the burden of proof with Judge Elliott dissenting. The burden of proof applied by the lower courts in

this case was inappropriate and not in accordance with statements of this Court. See, Koch Engineering Company v. Faulconer, 239 Kan. 101, 716 P.2d 180 (1986); Credit Union of America v. Myers, 234 Kan. 773, 676 P.2d 99 (1984). De-

NO. 87-60359-A

IN THE SUPREME COURT OF
THE STATE OF KANSAS

THE CITY OF ARKANSAS CITY, KANSAS,
THE CITY OF HESSTON, KANSAS and
SOUTHWEST NATIONAL BANK, Wichita, Kansas
Plaintiffs/Appellants,

v.

A. SCOTT ANDERSON, E. SYLVIA ANDERSON
K-M LAND CO., and LOUISBURG
GRAIN CO., INC.
Defendants/Appellees.

RESPONSE BY APPELLEES TO APPELLANTS' PETITION FOR REVIEW

Appeal from the District Court of
Johnson County, Kansas
The Honorable Larry McClain
District Court Case No. 85C9289

Paul Hasty, Jr., #09132
Thomas D. Billam, #12405
WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHTD.
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000
ATTORNEYS FOR APPELLEES

RESPONSE BY APPELLEES A. SCOTT ANDERSON, E. SYLVIA ANDERSON, K-M LAND CO., and LOUISBURG GRAIN CO., INC.

TO PETITION FOR REVIEW

BY PLAINTIFFS/APPELLANTS

COME NOW A. Scott Anderson, E. Sylvia Anderson, K-M Land Co., and Louisburg Grain Co., Inc., defendants/appellees, pursuant to Kansas Supreme Court Rule No. 8.03, and respectively make this brief response to the Petition for Review forwarded by plaintiffs/appellants, City of Arkansas City, Kansas, City of Hesston, Kansas and Southwest National Bank.

ARGUMENTS AND AUTHORITIES

Appellees, A. Scott Anderson, E. Sylvia Anderson, K-M Land Co., and Louisburg Grain Co., Inc. will not here provide any "issues" or "facts" because primarily Appellees submit that the Court of Appeals panel in Appeal No. 87-60359 correctly determined this appeal. That panel held: "It is clear that the trial court did not err in applying the burden of proof. After a thorough review of the evidence presented by both parties, the trial court concluded the plaintiffs had not sustained their burden of proof to establish a fraudulent conveyance by clear and convincing evidence." Memorandum Opinion, Appeal No. 60359, Page 5. The Court of Appeals panel also held, after thoroughly reviewing the

record of the trial court, "that the [p.3 original document begins] trial court's findings and conclusions are supported by substantial competent evidence." Id., page 6.

Plaintiffs/Appellants assert in their Petition for Review that the Court of Appeals erred in both of those holdings.

The trial court had the opportunity to review, analyze and weigh the testimony and evidence as it was introduced, and correctly determined that the Plaintiffs had failed to meet their burden of proof to establish fraud by clear and convincing evidence. The Court of Appeals panel correctly and properly applied the law of Kansas regarding standard of review, and determined that the burden of proof remained with Plaintiffs throughout,

that the trial court had correctly applied the proper burden of proof, and no error occurred.

What Plaintiffs/Appellants now ask the Kansas Supreme Court to do is create a shifting burden of proof, a request that Plaintiffs make based upon a mistaken interpretation of Koch Engineering Company v. Faulconer, 239 Kan. 101, 716 P.2d 180 (1986).

Regarding the second "issue" raised in Plaintiffs/Appellants' Petition for Review, regarding the existence of substantial competent evidence, Defendants/Appellees contend the Court of Appeals panel applied the proper standard of appellant review by reviewing the record to determine whether substantial competent evidence existed to support the findings and

conclusions of the trial court. The Court of Appeals panel in its determination stated [p.4] it had reviewed the record and did find substaintial competent evidence to support he trial court's findings and conclusions. Once the appellate court has conducted a search of the record and has determined that competent substantial evidence to support the trial court's findings is in existence, the appellate court's duty is done and the determination must be upheld. International Petroleum Services, Inc. v. S & N Well Services, Inc., 230 Kan. 452,464, 639 P.2d (1982).

For these reasons, Defendants/ Appellees contend there is no reason for a review by the Kansas Supreme Court of the determination by the Kansas Court of Appeals.

Defendants/Appellees therefore request that the Petition for Review be denied.

WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHARTERED

/s/ Thomas D. Billam

By_____
Paul Hasty, Jr., #09132
Thomas D. Billam, #12405
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000

ATTORNEYS FOR APPELLEES

[p.5] I hereby certify that a copy of the above and foregoing Response by Appellees/Defendants to Plaintiffs/ Appellants' Petition for Review was mailed this 30th day of March, 1988, to:

Thomas Ruzicka
Kenneth C. Jones
WATSON, ESS, MARSHALL & ENGASS
130 North Cherry
P. O. Box 550
Olathe, Kansas 66061

ATTORNEYS FOR PLAINTIFFS/APPELLANTS

/s/ Thomas D. Billam

Thomas D. Billam
For the Firm

IN THE SUPREME COURT

OF THE STATE OF KANSAS

No. 60,359

THE CITY OF ARKANSAS CITY, KANSAS,

THE CITY OF HESSTON, KANSAS

and

SOUTHWEST NATIONAL BANK, WICHITA, KANSAS

Appellants,

v.

A. SCOTT ANDERSON, E. SYLVIA ANDERSON,

K-M LAND CO., and

LOUISBURG GRAIN CO., INC.,

MOTION FOR REHEARING AND RECONSIDERATION

COME NOW defendants/appellees, A. Scott Anderson, E. Sylvia Anderson, K-M Land Company and Louisburg Grain Company, Inc., and pursuant to Supreme Court Rule 7.06, move this Court for a rehearing and reconsideration of Its Opinion of October 3, 1988, in Appeal No. 60359. In support of this motion, Appellees submit the following arguments and authorities.

I. AN IMPROPER SCOPE OF REVIEW WAS USED

In general, Appellees assert that the Supreme Court exceeded the proper scope and standard of review in this appeal. As was noted by Appellees in their Brief to the Court of Appeals, on page 12, when a decision is attacked for insufficiency of the evidence or as being contrary to the evidence, the duty of a Kansas appellate court extends only

to a search of the records for the purpose of determining whether there is any competent substantial evidence to support the [p.2] findings of the trial court. National Petroleum Services, Inc. v. S & N Well Service, Inc., 230 Kan. 452, 464, 639 P.2d 29 (1982) (Emphasis added). An appellant court should not weigh the evidence or pass on the credibility of the witnesses, but should examine the evidence in the light most favorable to the party prevailing below. Id.

Further, this very Surpreme Court of Kansas has recently ruled:

> "When reviewing the trial court's findings with respect to fraud, we must keep in mind that the existence of fraud is ordinarily a question of fact and this court's review is limited to determining whether the trial court's findings are supported by substantial competent evidence. Bank of Whitewater v. Decker Investments, Inc., 238 Kan. 308, 710

> P.2d 1258 (1985). Further, fraud is never presumed and must be proved by clear and convincing evidence. Nordstrom v. Miller, 227 Kan. 59, 65, 605 P.2d 545 (1980)."

Stauth v. Brown, 241 Kan. 1, 8-9, 734 P.2d 1063 (1987). This limited review of the evidence submitted at the trial court level was exactly the type of review conducted by the Kansas Court of Appeals in its unpublished Opinion of March 3, 1988. See pages 5 and 6 of that unpublished Opinion, which was attached to the Petition for Review filed by Appellants.

Although this Court purported to limit the scope of its review to determining whether the trial court's decision is supported by substantial competent evidence (see the second paragraph of the Opinion of October 3, 1988), a review of the Opinion itself

reveals that the Supreme Court in fact reviewed the evidence, weighed and considered the evidence, and made new factual findings contrary to those of the trial court. For example, on page 14 of the Opinion, this court stated: "The testimony that the December 10, 1984 deed was to take the place of a 'lost' deed is, under all the circumstances, weak, unsupported and highly suspect." On the same page of the Opinion, this court stated: "In order to determine whether a conveyance was made with the intent to hinder, delay or defraud creditors, we should examine the evidence with reference to the [p.3] six badges or indicia of fraud enumerated in Koch Engineering."

This court then proceeded to consider the six badges of fraud, and,

in fact, weighed the evidence to determine whether each of the six badges of fraud was established under the evidence. The scope and nature of that review was improper and totally inconsistent with prior case law by this same court.

As noted, this Court has expressly stated that its own review is limited to determining whether the trial court's findings are supported by substantial competent evidence. See, Stauth v. Brown, supra. Furthermore, this Court has expressly stated that the evidence presented to a trial court will not be passed upon or weighed by the Kansas Supreme Court, but rather that evidence would be reviewed in the light most favorable to the party prevailing at the trial court level, solely to determine

whether the trial court findings are supported by substantial competent evidence. Karner v. Willis, 238 Kan. 246, 710 P.2d 21 (1985).

There is no indication in the October 3, 1988 Opinion that the evidence was reviewed in the light most favorable to the Appellees; rather, the entire indication of the Opinion is that the evidence was reviewed de novo, with the Kansas Supreme Court improperly taking upon itself the burden to balance the evidence and make new factual findings.

It is important to note that the ten-page Memorandum Decision by the Honorable Larry McClain, entered November 21, 1986, fully and adequately considered the six badges of fraud discussed in Koch Engineering, and found

that, based on the evidence, Plaintiffs/Appellants had failed to establish fraud by clear and convincing evidence. The Kansas Court of Appeals, limiting its scope of review to a determination of whether there was sufficient competent evidence to support those findings, found in the affirmative, and upheld Judge McClain's determination. The Court of Appeals did not attempt to make [4] any new factual findings, and affirmed the trial court's determination.

In contrast, the Knasas Supreme Court did not limit its scope of review to a determination of whether there was substantial competent evidence to support the trial court's findings of fact. Instead, the Kansas Supreme Court improperly sat as a tryer of fact,

re-weighed the evidence, and issued specific findings of fact regarding the six badges of fraud enumerated in Koch Engineering. At several points, the Kansas Supreme Court stated the evidence was "clear" in indicating that one or more of the badges of fraud was established as a finding of fact. Those improper factual findings by the Kansas Supreme Court culminated in the last paragraph of the Opinion, which, in part, stated: "The evidence of fraud was overwhelming . . . . Plaintiffs presented strong evidence of fraud, and that evidence was not rebutted . . . . The judgment of the District Court is reversed and remanded with directions to enter a judgment for Plaintiffs in conformity with this opinion." See page 19 of the Opinion of October 3, 1988.

The "overwhelming" aspect of this Opinion is the unlimited scope of review the Kansas Supreme Court assumed in derogation of its previous decisions, such as Stauth, supra, Karner, supra, and National Petroleum, supra.

It is obvious that this opinion, of reversal and remand with directions to enter a judgment for plaintiffs, was in effect a trial de novo with the Kansas Supreme Court substituting its own factual findings for those of the trial court. The trial court, not the justices of the Kansas Supreme Court, had the opportunity to judge the demeanor and credibility of the witnesses presenting the evidence. Appellees consider this unlimited scope of review by the Kansas Supreme Court to have been improper, and request that

this court reconsider the matter under the proper scope of review and grant a rehearing.[p.5]

The Kansas Supreme Court did not even address the primary issue raised in the appeal by Appellants, to the effect that the trial court had erred in applying the burden of proof to plaintiffs. Appellants contended, both in their Brief to the Kansas Court of Appeals and in their Petition for Review, that they had created a prima facie case of fraud, and it then became the burden of Defendants to rebut that presumption. Nothing could be further from the truth or the proper burden of proof as this court delineated in Koch Engineering, supra. Fraud must always be proved by clear and convincing evidence by the Plaintiffs; that burden

has not been changed in Kansas law, and does not shift to Defendants.

The trial court properly applied the proper burden - requiring plaintiffs to show fraud by clear and continuing evidence - and made findings of fact that Plaintiffs' evidence had failed to meet that clear and convincing burden.

It was the essence of Plaintiffs' appeal that this burden of proof was improperly applied and therefore the Court of Appeals should have reversed. The Kansas Court of Appeals disagreed, and stated that the trial court had applied the proper burden of proof and that there was sufficient competent evidence to support the trial court's findings.

Nontheless, the Kansas Supreme Court in its October 3, 1988 Opinion did not

even mention the "clear and convincing" burden of proof, other than in its lengthy quotation, at pages 9-13, from Koch Engineering, supra. At page 10, this Court quoted the general rule that "Fraud is never presumed and must be established by clear and convincing evidence. The burden of establishing fraud is upon the party asserting it."

This Kansas Supreme Court made no determinations that the burden of proof was improperly applied by either the trial court or the Kansas Court of Appeals; instead, the Kansas Supreme court reviewed all the evidence, de novo, and made new and improper findings of fact that the badges of fraud had been [p.6] established at the trial court level, and that the judgment for Plaintiffs should be entered in

conformity with the Opinion. Again, Appellees assert that this re-weighing of the evidence was a totally improper scope of review, and Appellees request the Kansas Supreme Court to reconsider and rehear this appeal based on the appropriate and limited scope of review: a determination whether there was sufficient and competent evidence to support the specific findings of fact by the trial court.

II. THE EVIDENCE SUPPORTS TRIAL COURT'S FINDINGS

Under the proper scope of review - a search of the Record to determine whether there is any substantial competent evidence to support the trial court findings - it is obvious that Johnson County District Judge McClain

was correct in his findings and determination that fraud had not been proven by clear and convincing evidence. The Kansas Supreme Court Opinion of October 3, 1988, ignored that scope of review, and "retried" the case by picking out evidence from the Record to support the Plaintiff's position. Instead, this Court should have reviewed the records simply to determine if there was evidence to support the trial court's findings.

In an effort to assist this Court, Appellees will provide numerous instances where the Kansas Supreme Court ignored evidence that supported the trial court's findings, and instead improperly picked out evidence to support contrary findings.

A. The transfer from Anderson to Louisburg Grain Co., Inc. was not on appeal or before the Kansas Supreme Court. Nowhere in the Brief of Appellants to the Kansas Court of Appelas is there any attack or argument concerning the trial court's determination that the transfer of land from defendants Anderson to Louisburg Grain Co., Inc. was not fraudulent. Appellants refer to the Louisburg Grain conveyance of December 12, 1984 in appellants Statement of Facts, at Pages 3 and 7 of [p.7] their Brief. However, the issues stated and addressed by Appellants in the arguments from Pages 11 through 23, refer only to the conveyance of land from defendants Anderson to K-M Land Company.

In fact, the Petition for Review filed by Appellants to the Kansas Supreme Court, Appellants stated:

> "It should be noted that while the trial of this matter also concerned a conveyance to Louisburg Grain Company, another Anderson owned and controlled corporation, the appeal and indeed this Petition for Review concerns solely the K-M Land Company transfer". (Emphasis added)

See page 10 Appellants' Petition for Review.

Nonetheless, the Kansas Supreme Court noted at Page 6 of its Opinion of October 3, 1988 that the conveyance of the Andersons to Louisburg Grain Co., Inc. "is the second conveyance in issue here."

It is obvious from the Appellants' own statement in the Petition for Review that the Louisburg Grain Co., Inc. transfer was not an issue for review by the Kansas Supreme Court, and therefore

any action regarding the Louisburg Grain Co., Inc. transfer is entirely outside and beyond the Kansas Supreme Court scope of review. For this reason alone, the Opinion of October 3, 1988 reversing the Johnson County District Court opinion should be reconsidered.

The testimony at the trial court level was undisputed that the property transferred to Louisburg Grain Co., Inc. occurred many years prior to when legal action was initiated against the Andersons and the Kettermans. Defendants Anderson transferred their interest in the property to the Louisburg Grain Company in late 1978 or early 1979, according to the testimony of A. Scott Anderson. (Record, Vol. III-B, Pg. 24, Lines 21-25; Record, Vol. II, Pg. 44.) However, because of a

filing or indexing error, that deed could not be located within the indexing system. (Record, Vol. III-B, Pg. 33, Lines 12-25, Pg. [p.8] 34, Line 1; Record Vol. II, Pg. 47; Vol VI, Pg. 127-132.) That transfer in 1978 or 1979 was documented in each of the defendants Anderson's tax returns and was in fact documented by an Internal Revenue Service agent. (Record, Vol. II, Pg. 47.) There is nothing in the Record on Appeal to dispute the Andersons' 1978-1979 transfer to Louisburg Grain Co., Inc. The trial court specifically considered this evidence, and, in particular, defendants' Exhibits "X" and "Y", and concluded that the evidence failed to establish the Louisburg Grain Co., Inc. transfer was made within intent to defraud. (Record, Vol. I, Pg. 42.)

Therefore, at the very least, the Kansas Supreme Court Opinion of October 3, 1988 should be reconsidered so that the Louisburg Grain Co., Inc. transfer be excluded from the Opinion, and therefore be allowed to stand as a proper conveyance.

B. The Kansas Supreme Court incorrectly assumed, on Page 15 of its Opinion of October 3, 1988, that a judgment deficit of $2.5 million remained after Plaintiffs/Appellants had executed on various of Andersons' assets. Plaintiffs presented no evidence regarding the remaining judgment deficiency after each of the motels were sold.

The amount of the alleged deficit is important because the Kansas

Supreme Court apparently assumed a deficit of $2.5 million existed at the time of the conveyances, and used that assumption to further assume that the Andersons were insolvent. These assumptions by the Kansas Supreme Court are simply incorrect, and provide no basis for a new and improper finding of fraudulent intent.

C. There was no evidence at trial that Dr. Herbert Ketterman, another of the group of investors with the Andersons, was insolvent at the time of the Andersons' transfer [p.9]of land to K-M Land Co. At trial, a financial statement of Dr. Ketterman was introduced to show that at the time of the K-M Land Co. transfer, Dr. Ketterman had net worth well in excess of the

remaining deficit on each of the two judgments against the Andersons and Ketterman. (Rec. Vol. IV-B, Exhibit "K"). There is no evidence in the Record that at the time the K-M Land transfer occurred - June 4, 1984 - that Dr. Ketterman was insolvent; there was certainly no evidence in the Record that Defendants Anderson had any knowledge that Dr. Ketterman may have been insolvent at the date of the transfer.

It is, therefore, undisputed by the Ketterman financial statement introduced as evidence at trial (Rec. Vol. IV-B, Exhibit "K"), that Dr. Ketterman had a net worth well in excess of the judgment deficits at the time of the June 4, 1984, transfer. Dr. Ketterman never

told the Andersons he was unable to pay the two judgments. (Rec., Vol. IV, Page 37, Lines 8-14; Pag. 94, Lines 8-11; Pg. 96, Lines 23-25, Pg. 97, Lines 1-3.) At the time of the transfer, the Andersons had no reason to suspect that Dr. Ketterman lacked sufficient personal assets to cover the outstanding deficits of both judgments, and had every reason to believe that Dr. Ketterman would pay the judgments in question. (Rec. Vol. IV, Pg. 32, Lines 12-25, Pg. 3, Lines 1-15; Pg. 159, Lines 1-8.) In fact, Dr. Ketterman testified he had finances available to pay "whatever deficiency" might result from the judgments against Main Corp. and K-A Corp., (Rec., Vol. VI, Pg. 34, Lines 6-9), even up until he was sentenced in February 1985, (Rec., Vol. VI, Pg. 36, Lines 8-21).

These "assumptions" of insolvency of Dr. Ketterman by the Kansas Supreme Court are relevant as they relate to the "third badge" of fraud delineated in Koch Engineering, Supra. It is highly relevant because at the time of the transfer, the Andersons had, as an asset, an indemnity agreement from Dr. Ketterman (Rec. Vol. IV, Pg. 66, Lines 14-25; Vol. IV-B, Exhibit "B"). Dr. Ketterman at the time had a net worth of [p.10] $2.25 million and an income in the range of $250,000 annually, plus an additional investment income. (Rec Vol. VI, Pg. 32, Lines 12-25, Pg. 33, Lines 1-15, Pg. 33, Lines 16-24, Pg. 34, Lines 4-5; Vol. IV-B, Exhibit "K", 1983 financial statement of Dr. Ketterman.)

The "assumed" insolvency of Dr. Ketterman is highly relevant regarding

the solvency of the Andersons at the time of the K-M land transfer, which occurred June 4, 1984. The Kansas Supreme Court ignored the evidence at trial that at the time of the K-M Land transfer, and immediately before, the Andersons had interests in numerous other parcels of real estate in Kansas, with substantial value. The Andersons had interests in land and motel in Fredonia, Kansas, land and motel in Garnet, Anderson County, Kansas, several pieces of real estate in Miami County, Kansas, and several interests in partnerships which owned pieces of land around Kansas. (See, e.g., Rec. Vol. III-B, deposition of A. Scott Anderson, Pg. 30, Lines 2-9, reflecting a 9.75% interest in land opportunities of June 1984; same deposition, Pg. 3, Lines

20-25, Pg. 31, Lines 1-7, reflecting a 5% interest in Tomahawk Investment Company as of June, 1984; same deposition, Pg. 32, Lines 11-12, relfecting a 5% interest in Kenneth Investments as of June, 1984; same deposition, Pg. 32, Lines 16-25, Pg. 33, Lines 7-11, reflecting an interest in a 44 acre tract in Johnson County, Kansas as of December, 1983; same deposition, Pg. 33, Lines 13-25, Pg. 34, Line 1, reflecting ownership by Louisburg Grain Co. of a 19 acre tract in Johnson County, Kansas, conveyed by apparently unregistered deed by the Andersons "a number of years before"; same deposition, Pg. 34,, Lines 7-9, reflecting a 50% interest in land in Fredonia, Kansas; same deposition, Pg. 34, Lines 10-12, reflecting a 50%

ownership interest in a motel in Garnett, Anderson County, Kansas; same deposition, Pg. 34, Lines 13-18, reflecting ownership of real estate in Miami County, [p.11] Kansas, subject to contract for deeds; See also, A. Scott Anderson testimony at trial, Rec. Vol. VI, Pgs. 142-146, discussing all of these assets.)

It bears noting that many of these interests of the Andersons in real estate were later executed upon by plaintiffs and sold at sheriff sales, which sales were subsequently declared improper and void by the Kansas Court of Appeals in an unpublished Opinion in Appeal No. 59514, and by the Kansas Court of Appeals in Appeal No. 59596, City of Arkansas City v. A. Scott Anderson, 12 Kan. App.2d, 490 (1988).

Further, the Kansas Supreme Court ignored testimony by the Andersons' accountant, David Miller, that the transfer of the land to K-M Land in June of 1984, and the gift of stock to the Andersons' children, was a "very, very incidental portion of his total estate." (Rec., Vol. II, David Miller testimony, Pg. 56, Lines 5-15.)

All of this evidence regarding the solvency of the Andersons was ignored by the Kansas Supreme Court in stating, at Pg. 15-17 of its Opinion, that the property of the Andersons did not approach the amount of the outstanding judgments. The Kansas Supreme Court placed importance on the fact that the Andersons executed Affidavits on April 10, 1985 (nine months after the K-M Land transfer) that the Andersons did not

expect to satisfy the Plaintiffs' judgments against them. It is apparent the Kansas Supreme Court has misinterpreted its own Opinion of Koch Engineering, Supra. The relevant factor in the "third badge" of fraud, regarding insolvency, is the date of the transfer, here, June 1984. There is no question that numerous things were occurring regarding the finances of the Andersons, but there is no evidence in the record to support a determination of insolvency at the time of the June, 1984 transfer. To the contrary, there is ample evidence that the Andersons had substantial assets at the time of the transfer, and the Andersons' own accountant stated the transfer of the [p.12] land to K-M Land was a "very, very incidential portion of his total estate.") Rec. Vol. II, David

Miller testimony, Pg. 56, Lines 5-15.)

For all these reasons, there was substantial evidence for the trial court to determine that neither the Andersons, nor their prior business partner, Dr. Ketterman (from whom they had an indemnity agreement) were insolvent at the time of the transfer in June of 1984. For these reasons alone, the Kansas Supreme Court should reconsider and affirm the trial court's determination that there was no fraud proven. As the trial court noted, although the Andersons were experiencing cash flow problems, "the Andersons still are in possession of assets having value" (Rec. Vol. I, Pg. 44), and therefore the Andersons were <u>not</u> insolvent at the time of the K-M Land transfer.

D. Because the Andersons did not expect any deficiency to result from the Harvey or Cowley County judgments, they had no intent to defraud any creditors in the transfer of land to K-M Land Corporation in June, 1984. Without intent to defraud, there can be no fraudulent conveyance. This was the evidence considered by the trial court, but ignored by the Kansas Supreme Court. Again, because the Kansas Supreme Court used the improper standard of review, and ignored substantial, competent evidence that did support the trial court's determination, the Kansas Supreme Court erred in its Opinion of October 3, 1988.

For all these reasons, and because of all of the references to testimony which supported the Opinion of Johnson County District Judge McClain, Appellees request this Court to reconsider its Opinion of October 1, 1988, to rehear the matter, if necessary, and to affirm the judgment of the Court of Appeals and the judgment of the District Court, to the effect that Plaintiffs failed to prove, by clear and convincing evidence, that any fraud was involved in either conveyance.

Respectfully Submitted,

WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHARTERED

/s/ Thomas D. Billam

By _____

Paul Hasty, Jr. #09132
Thomas D. Billam #12405
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000
Attorneys for Defendants/
Appellees

I hereby certify that a copy of the above and foregoing Motion for Rehearing and Reconsideration was mailed this 24th day of October, 1988, to:

Thomas E. Ruzicka
Kenneth C. Jones
WATSON, ESS, MARSHALL & ENGASS
130 North Cherry
P. O. Box 550
Olathe, Kansas 66061

ATTORNEYS FOR PLAINTIFFS/APPELLANTS

/s/ Thomas D. Billam

Thomas D. Billam
For the Firm

IN THE SUPREME COURT
OF THE STATE OF KANSAS

City of Arkansas City, Kansas,
City of Hesston, Kansas, and
Southwest National Bank,
Wichita, Kansas, Appellant

v. No. 87-60359-A

A. Scott Anderson and
E. Sylvia Anderson, et al,
Appellees

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing.

Denied

Date December 20, 1988

Yours very truly,

Lewis C. Carter
Clerk,
Supreme Court

No. 60,359

The City of Arkansas City, Kansas, The City of Hesston, Kansas and Southwest National Bank, Wichita, Kansas, *Appellants*, v. A. Scott Anderson, E. Sylvia Anderson, K-M Land Co., and Louisburg Grain Co., Inc., *Appellees*.

SYLLABUS BY THE COURT

1. FRAUD AND DECEIT-*Fraudulent Conveyance-Elements.* The elements which comprise a fraudulent conveyance are first, an intent on the part of the grantor to hinder, delay, or defraud his creditors and second, the participation of the grantee in such fraudulent scheme or such knowledge on the latter's part of facts and circumstances as would import knowledge of the fraud to him.

2. SAME-*Fraudulent Conveyance-Indicia of Fraud.* Under the facts of this case, the badges or indicia of fraud are: (1) a relationship between the grantor and grantee; (2) the grantee's knowledge of litigation against the grantor; (3) insolvency of the grantor; (4) a belief on the grantor's part that the asset transferred by the grantor was the grantor's last asset subject to a Kansas execution; (5) inadequacy of consideration; and (6) consummation of the transaction contrary to normal business procedures.

3. SAME-*Fraudulent Conveyance-Transfer of Property by Debtor in Anticipation of Suit against the Debtor or While Suit Was Pending against the Debtor.* A transfer

made by debtor in anticipation of a suit against him, or after a suit has begun and while it is pending against him, is a badge of fraud, especially if it leaves the debtor without any estate, or greatly reduces his property.

4. REAL PROPERTY-*Transfer of Property between Members of a Family-Transfer Subject to Stricter Scrutiny Than between Strangers Where Creditor's Rights May Be Thwarted.* The facts and circumstances surrounding a transfer or conveyance of property between members of a family are properly subjected to stricter scrutiny as to their *bona fides* than between strangers, where the rights of creditors are, or may be, thwarted thereby. This rule is

equally applicable to transfers between persons and a coporation wholly owned by them.

5. WORDS AND PHRASES-"*Insolvency.*" Insolvency is the condition of a person who is unable to pay his or her debts.

Review of the judgment of the Court of Appeals in an unpublished decision filed March 3, 1988. Appeal from Johnson district court, LARRY McCLAIN, judge. Judgment of the Court of Appeals affirming the district court is reversed and remanded with directions. Opinion filed October 3, 1988.

Kenneth C. Jones of Watson, Ess, Marshall & Engass of Olathe, argued the case, and *Thomas E. Ruzicka*, of the

same firm, was with him on the briefs for the appellants.

Paul Hasty, Jr., of Wallace, Saunders, Austin, Brown & Enochs, Chartered, of Overland Park, argued the case, and *Thomas D. Billam*, of the same firm, was with him on the briefs for the appellees.

The opinion of the court was delivered by

Miller, J.: The City of Arkansas City, Kansas, the City of Hesston, Kansas, and the Southwest National Bank, Wichita, Kansas, fiscal agent for the Cities, plaintiffs in this action, appeal from the judgment of the district court of Johnson County, Kansas, refusing to set aside as fraudulent two conveyances of Johnson County land by the defendants, A. Scott Anderson and E. Sylvia Anderson, to two closely held

corporations, defendants K-M Land Co. and Louisburg Grain Co., Inc. A panel of the Court of Appeals, in an unpublished opinion filed March 3, 1988, affirmed the trial court, one judge dissenting. We granted review.

The controlling issue raised on appeal is whether the trial court's decision is supported by substantial, competent evidence. We hold that it is not.

We shall first state the facts in a somewhat chronological order. Sometime prior to 1980, the City of Arkansas City and the City of Hesston issued industrial revenue bonds to finance the purchase of real estate and the construction of motels. Arkansas City issued bonds in the amount of $2,500,000 and Hesston in the amount of $650,000.

The motel erected in Arkansas City was leased to the Main Corporation and that in Hesston to the K-A Corporation. The principals in both corporations were Dr. Herbert L. Ketterman and A. Scott Anderson. The Kettermans and the Andersons personally guaranteed the pricipal, redemption premiums, and interest on the industrial revenue bonds. About 1980, Dr. Ketterman bought Anderson's interest in the Main Corporation and gave Anderson an indemnity agreement; this, however, did not release the Andersons from their personal guarantee to the City of Arkansas City.

Both the Main Corporation and K-A Corporation defaulted on their lease payments in 1982. In June 1983, the Cities and the Bank filed suit against

the respective corporations, the Kettermans and the Andersons. Arkansas City filed its suit in the district court of Cowley County; Hesston filed its suit in the district court of Harvey County. Both suits sought judgment against the lessee corporations (the Main Corporation in the Arkansas City suit, the K-A Corporation in the Hesston action) and against the Kettermans and the Andersons for any deficiency in making the bondholders whole. Shortly after these state court lawsuits were filed, both corporations filed petitions in bankruptcy. The bankruptcy court later removed the stay so that the state court actions could proceed against the corporations and the guarantors, the Kettermans and the Andersons.

Ketterman owned substantial property, and Anderson expected Ketterman to pay the Cities' claims. However, on May 1, 1984, Dr. Herbert L. Ketterman was charged with criminal offenses, totally unrelated to this case, in Johnson County. Ketterman spent the next nine months putting his affairs in order and liquidating his assets. None of the proceeds were applied to his obligations to the Cities. Ketterman was in the penitentiary at the time this case was tried; apparently he is insolvent.

The Cowley County case was originally set for trial on May 8, 1984. However, by letter dated May 7, 1984, the trial judge, the Honorable Robert Bishop, notified all parties or their attorneys that trial would be held

on July 6, 1984. Also on May 7, 1984, the Andersons signed articles of incorporation for K-M Land Co., a Kansas corporation. On May 15, the articles were filed with the Secretary of State, and on May 22, with the Johnson County Register of Deeds. The Andersons were the sole owners and stockholders of K-M Land Co. On June 4, the Andersons signed and executed a warranty deed conveying their undividied 1/4 interest in and to certain very valuable tracts of land at 119th and Antioch Streets, near the Switzer Bypass (now U.S. Highway 69), in Overland Park, Kansas, to K-M Land Co. The deed was filed for record in the Register of Deeds' office on June 15, 1985. That is one of the conveyances in issue here.

On June 18, the Andersons conveyed an undivided 7.5% interest in certain property located at 119th Street and Pflumm Road to David Miller, their certified public accountant. Testimony indicates that the conveyance was in part payment for past services rendered by Miller. On July 3, Dr. Herbert Ketterman and Scott Anderson, as general partners of Land Opportunities Co., conveyed property at 119th Street and U.S. Highway 69 to James A. Goode Construction Co., Inc. Neither of these conveyances is attacked here.

On July 6, 1984, trial was held in Cowley County in the Arkansas City case. Defendants did not contest the plaintiffs' allegations at trial. Judment was entered in favor of the plaintiffs, Arkansas City and the Bank,

and against the Andersons and others, for the sum of $2,604,029.49 plus interest at 8.421% from and after July 6, 1984. The journal entry of judgment was filed on November 15, 1984. In Harvey County, trial was held on October 11, 1984. Judgment was entered in favor of the City of Hesston and the Bank, and against the Andersons, for $585,000 plus interest at 8.4774% from and after September 1, 1983. The journal entry of judgment was filed on November 18, 1984. Attested copies of the journal entries of judgment in both cases were filed in the office of the clerk of the Johnson County District Court on December 21, 1984.

Meanwhile, on December 10, 1984, the Andersons conveyed a 1/4 interest in a nineteen-acre tract of land on the east

side of U.S. Highway 69 and north of 119th Street in Overland Park, to Louisburg Grain Co., Inc., another entity wholly owned by the Andersons. The deed was filed for record December 12. That is the second conveyance in issue here. Plaintiffs seek to set both deeds aside. On August 6, 1984, A. Scott Anderson wrote Eugene D. Brown with reference to the tract conveyed to K-M Land Co. on June 4, 1984. Anderson indicated that he would be interested in a cash offer of $2 or more per square foot, "provided there is provision for trade in the contract." He explained that his 25% ownership had been conveyed to K-M Land Co. of which he was the president. On August 17, the Andersons, as directors of K-M Land Co., approved the sale of the same land to T.J. Kline,

Inc. On August 20, a real estate contract was entered into between K-M Land Co. and other owners, and T.J. Kline as buyer, for a price of $4,000,000.

On January 21, 1985, Louisburg Grain Co., Inc., and other owners entered into a contract to sell 19 acres of land on the east side of U.S.Highway 69 to Chasewood Company for $1.90 per square foot, or in excess of $1,500,000.

In March of 1985, the John Sims Trust was created to acquire and hold Missouri real estate for K-M Land Co. The Andersons and their children were beneficiaries of the trust. On March 14, 1985, K-M Land Co. conveyed to T. J. Kline, Inc., part of the tract previously conveyed by the Andersons to K-M Land Co. K-M Land Co. received

$1,053,197 as its share of the proceeds of this sale. On the same day, March 14, 1985, T. J. Kline, Inc. conveyed 200 acres of McDonald County, Missouri, land to the John Sims Trust.

Mr. Anderson testified in substance that K-M Land Co. was created for estate tax purposes. He and Mrs. Anderson conveyed land to K-M Land Co. in return for all of the stock in the corporation. They then gave shares of stock in the corporation to their seven children. They transferred some of their stock in K-M Land Co. to their children in 1984 and some in 1985. There was testimony that a gift tax return was prepared to report these gifts of stock. Anderson had received advice on such estate planning in 1982 and 1983 from several sources, including

two accounting firms and a lawyer. The Andersons had previously created Lost Valley Ranch, a Missouri corporation, received stock in return, and gave stock to their seven children, all in 1983.

On October 23, 1985, the Cities of Arkansas City and Hesston, together with their fiscal agent on the industrial revenue bonds, Southwest National Bank of Wichita, Kansas, filed this suit against the Andersons, K-M Land Co., and Louisburg Grain Co., Inc. in Johnson County District Court, claiming that the deeds conveying the tracts of Johnson County land to K-M Land Co. and Louisburg Grain Co., Inc. were made "with the intent to hinder, delay and defraud their creditors . . . in violation of K.S.A. 33-102." Plaintiffs sought to have the conveyances from the

Andersons to the two corporations set aside, annulled, and held utterly void. The trial judge held that the conveyance of December 12, 1984, to the Louisburg Grain Co., Inc. was made because the original deed from the Andersons to the grain company was lost or misfiled. The judge then discussed the evidence in light of the badges of fraud identified in *Koch Engineering Co. v. Faulconer*, 239 Kan. 101, 105, 716 P.2d 180 (1986), and concluded that the evidence here failed to establish the intent of the Andersons or that either conveyance was fraudulent. Plaintiffs appeal, and we reverse.

K.S.A. 33-102 has been a part of Kansas statutory law since 1868. It provides:

"Every gift, grant or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to hinder, delay or defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect."

Plaintiffs contend that the two conveyances by the Andersons to their wholly owned corporations, made on the eve of or shortly after judment, are fraudulent and void under the statute. Before going further, it will be helpful to review what we have recently said regarding the law of fraudulent conveyances. In *Koch Engineering Co. v. Faulconer*, 239 Kan. at 105-08, we said:

"'In general, the elements which comprise a fraudulent convenyance are first, an intent on the part of the grantor to hinder, delay or defraud his creditors and second, the participation of the grantee in such fradulent scheme or such knowledge on the latter's part of facts and circumstances as would import knowledge of the fraud to him. This court has recognized six badges or indicia of fraud. The badges or indicia of fraud are: (1) a relationship between the grantor and grantee; (2) the grantee's knowledge of litigation against the grantor; (3) insolvency of the grantor; (4) a belief on the grantee's part that the contract was the grantor's last asset subject to a Kansas execution; (5) inadequacy of consideration; and (6) consummation of the transaction contrary to normal business procedures."

"The above list, of course, is not intended to be exclusive. As the Supreme Court of Oklahoma said:

"'"The possible indicia of fraud are so numerous that no court could pretend to anticipate and catalog them."'" *Toone v. Walker,* 115 Okla. 289, 291, 243 Pac. 147 (1926).

Similarly, in 37 Am. Jur. 2d, Fraudulent Conveyances, § 10, we find:

"'The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all.'

Also, in 37 C.J.S., Fraudulent Conveyances § 79:

" 'While some courts, without purporting to set forth an exhaustive list, have enumerated many of the more common badges of fraud, the possible indicia of fraud are so numerous that no court could undertake to anticipate and catalog them all; they are as inifinite in number and form as are the resources and versatility of human artifice.'

"'The general rule is, of course, that fraud is never presumed and must be established by clear and convincing evidence. The burden of establishing fraud is upon the party asserting it. Direct evidence of fraud is not always available; more frequently fraud must be established by circumstantial evidence.

"As we said in Syl. Þ2 of *Credit Union of Amer. v. Myers*, 234 Kan. 773:

"'Honesty and fair dealings are presumed, and one charging fraud must prove the same. Direct proof of fraud can seldom be obtained. Such evidence is not absolutely essential to establish the dishonest purposes of the parties to a pretended transfer of property. The fraudulent purpose may be shown by the conduct and appearance of the parties, the details of the transactions, and the surrounding circumstances.'

. . . .

"We agree with the trial court that badges of fraud are suspicious circumstances, but more need be said about them. Badges of fraud are circumstances frequently attending conveyances and transfers intending to hinder, delay, or defraud creditors. They are red flags, and when they are

unexplained in the evidence, they may warrant an inference of fraud. Some are weak; others are strong. One weak badge of fraud, standing alone, would have little evidentiary value in establishing a fradulent conveyance. For example, the mere fact that grantor and grantee are related, standing alone, would not support a finding that the conveyance was fraudulent. On the other hand, the concurrence of several badges of fraud are said to make out a strong case. See 37 C.J.S. Fraudulent Conveyances § 79; 37 Am. Jur. 2d, Fraudulent Conveyances § 10; *Brennecke v. Riemann,* 102 S.W. 2d 874, 877 (Mo. 1937); and see *Hildebrand v. Harrison,* 361 P.2d 498, 505 (Okla. 1961), where it was said:

"'In *Apple v. American Nat. Bank of Ardmore,* 104 Okl. 69, 231 P.79, 82, we said in the second paragraph of the syllabus that "If a transfer is made by a debtor in anticipation of a suit against him, or after the suit has begun, and while it is pending against him, this is a badge of fraud, and especially if it leaves the debtor without any estate, or greatly reduces his property." As heretofore pointed out, the Ravenscraft-Hildebrand conveyance was made after the Huston suit had been filed.

"'We had this to say in the third and fourth paragraph of the syllabus to *Toone v. Walker, et al.,* 115 Okl. 289, 243 P.147:

"'"'Badges of fraud' are suspicious circumstances that overhang a transaction, or appear on the face of

the papers. The possible indicia of fraud are so numerous that no court could pretend to anticipate and catalog them. A single one may stamp the transaction as fraudulent, and when several are found in combination, strong and clear evidence on the part of the upholder of the transaction will be required to repel the conclusion of fraud."'

As we have noted, the party who alleges fraud has the burden of proving it. This does not mean the party must come forward with direct evidence of fraud. When the party produces evidence of several badges of fraud, that evidence, if unrefuted and unexplained, may well be sufficient to fulfill the party's burden of proof. While the burden does not shift, the opposing party then has the opportunity of going forward with the evidence, for, as we said in *Polk v. Polk*, 210 Kan. 107, 499 P.2d 1142 (1972):

"Where the circumstances surrounding the execution of a conveyance are such that an inference of fraud may be drawn therefrom, such inference is subject to being rebutted.' Syl. Þ 5."

The trial court first discussed the December 10, 1984, deed for nineteen acres from the Andersons to the Louisburg Grain Co., Inc. Mr. Anderson

testified that they believed that they had transferred this land to the grain company in 1978, but that the deed had somehow been lost in the filing and recording process. Defendants offered Exhibits X and Y in support of this testimony. Exhibit X, read in the light most favorable to the Andersons, indicates Mr. Anderson, acting as president of Louisburg Grain Co., Inc., entered into a contract to sell the land in 1979. The contract fell through, and no title was transferred. Exhibit Y is a memo from a title company to Mr. Anderson, dated 1981, stating that the property was then still titled to A. Scott and E. Sylvia Anderson rather than Louisburg Grain Co., Inc. Thus, Anderson was notified in 1981 that title to the land was held by the Andersons

personally and not by the corporation. The facts and circumstances surrounding a transfer or conveyance of property between members of a family are properly subjected to stricter scrutiny as to their *bona fides* than between strangers, where the rights of creditors are, or may be, thwarted thereby. *Stephenson v. Wilson*, 147 Kan. 261, Syl. Þ 2m 76 P.2d 810 (1938). This rule is equally applicable to transfers between persons and a corporation wholly owned by them.

No attempt to make any "correction" as to the "misfiled" or "lost" deed was made until more than five months after the $2,500,000 judgment was entered against the Andersons, and eleven days after both judgments became liens in Johnson County. The corporate minute

books of the grain company were missing, and no federal or state tax returns had been filed by the company for five or six years. There was no record, made at the time of the alleged original transfer, supporting it. There was no evidence as to who supposedly prepared the 1978 deed, who recorded it or when it was recorded, to whom the annual tax statements were directed, or who paid the taxes on that land from 1978 through 1984. The annual returns of Louisburg Grain Co., Inc. for the years 1978-1984 do not show that the corporation owned any land. The testimony that the December 10, 1984, deed was to take the place of a "lost" deed is, under all of the circumstances, weak, unsupported, and highly suspect. We conclude that the deed to Louisburg Grain Co., Inc.

should be examined under the same light as the June 4, 1984, deed to K-M Land Co.

In order to determine whether a conveyance was made with the intent to hinder, delay or defraud creditors, we should examine the evidence with reference to the six badges or indicia of fraud enumerated in *Koch Engineering*. The first badge is relationship between grantor and grantee. Mr. and Mrs. Anderson were the owners and sole stockholders of both Louisburg Grain Co., Inc. and K-M Land Co. at the time of the transfers of land to the respective corporations. Since the Andersons owned the land and the corporations, the transfers were only a matter of bookkeeping - the Andersons simply transferring the title to the land from one pocket to another. They

remained in full control of the real estate for all practical purposes. The relationship badge was established.

The second badge of fraud is the grantee's knowledge of litigation against the grantors. Anderson was president of both corporations. The law of agency generally imputes the knowledge of an agent to the principal. *Rosenbaum v. Texas Energies, Inc.*, 241 Kan. 295, Syl. Þ 4, 736 P.2d 888 (1987). A corporation is an artificial person; it may acquire knowledge only through real people-its officers, agents, or employees. Anderson's knowledge as president of Louisburg Grain Co., Inc. and K-M Land Co. is imputable to those corporations. See *Grounds v. Triple J Constr. Co.*, 4 Kan. App. 2d 325, 333-34, 606 P.2d 484,

rev. denied 227 Kan. 927 (1980). The corporations would have identical knowledge as that of the Andersons. The knowledge of litigation badge was established.

The third badge of fraud is the insolvency of the grantors. The trial court found:

"The evidence presented fails to establish that at the time of the conveyance the Andersons were insolvent. There was evidence that they were experiencing cash flow problems, however, the fact that plaintiffs were subsequently able to execute on $500,000 worth of Andersons' assets would not indicate insolvency. In addition, there is evidence that the Andersons are still in possessions of assets having value. The evidence here fails to lead one to conclude that fraud was involved in the conveyance."

We disagree. While it is true that the plaintiffs were able to levy execution on assets of the Andersons worth some half million dollars, there

remain unsatisfied judgments of more than $2,500,000. While the Andersons may yet have property of some value, there is nothing in the record to indicate that the value of their remaining property approaches the amount of the judgments. On April 10, 1985, the Andersons executed affidavits stating that because of their financial condition, they could not satisfy the judgments of the plaintiffs against them. They recite in those affidavits the fear of another suit on a different obligation by the Bank of Hesston; a $180,000 lawsuit pending against them in United States District Court; their interest in two real estate ventures, both of which were then in foreclosure proceedings; and their ownership of two seven-year-old vehicles which are in

need of repair, some 20-year-old farm machinery, which is mortgaged, and livestock valued between $65,000 and $70,000.

It is clear from the evidence in this case that the Andersons' interest in the Johnson County real estate involved in this case was by far the most valuable property owned by them at the time of the transfer. It is also clear that without their interest in that land, the Andersons had no assets which would approach in value the amount of the plaintiff's judgments. Insolvency is the condition of a person who is unable to pay his or her debts. The person may have assets of great value, but if the value is less than the obligations, the person is insolvent.

In *Security Befit Ass'n. v. Swartz*, 141 Kan. 227, 232, 40 P.2d 433 (1935), we quoted the following statement from 27 C.J. 501:

"With respect to the financial condition of the grantor, within the rule governing fraudulent conveyances, he will be considered insolvent when his property, subject to the payment of his debts, is not sufficient to pay all his debts. Insolvency has also been defined as the inability to pay debts when they become due in the ordinary course of business, or where the value of his remaining property is so near the amount of his debts that the conveyance tends directly to impair the creditor's power to force collection by judicial process.'"

As the Oklahoma Supreme Court said in *Hildebrand v. Harrison*, 361 P.2d 498, 505 (Okla. 1961), quoted in that portion of our opinion in *Koch Engineering Co.*, 239 Kan. at 107:

"'If a transfer is made by the debtor in anticipation of a suit against him, or

after a suit has begun, and while it is pending against him, this is a badge of fraud, and especially if it leaves the debtor without any estate, or *greatly reduces his property.*'" (Emphasis Supplied.)

This is precisely what the Andersons did here. They transferred the ownership of their most valuable assets to corporations which they owned and controlled, greatly reducing their holdings and leaving them without sufficient assets to satisfy plaintiffs' judgments. The transfers left the Andersons insolvent. The insolvency badge was established.

The fourth badge of fraud is belief on the grantee's part that the property conveyed was the grantor's last asset subject to a Kansas execution. The grantee's knowledge here is, of course, the same as that of the grantors. The

trial court, in light of the fact that the plaintiffs were able to levy execution on other property worth some $500,000, found that this badge was not established. Again, we disagree. By "the last asset" we are concerned with the last substantial asset, the last one out of which a creditor may hope to satisfy a judgment. The property conveyed to the two corporations included the most substantial assets of the Andersons, and left them without sufficient property in Kansas to come anywhere near satisfying their judgments. The mere fact that the debtors owned interests in other properties, worth a small fraction of the amount of the judgments, does not defeat the establishment of this badge

of fraud. We hold that it was established.

The fifth badge of fraud is inadequacy of consideration. Here, the Andersons conveyed real estate to the K-M Land Co. in exchange for stock in tht corporation. We agree with the trial court that that fact, in and of itself, does not establish that the transfer was without consideration. Presumably, the stock in the closely held corporation approximates the value of the corporate assets. This badge was not established with regard to K-M Land Co. As to the transfer of Louisburg Grain Co., Inc., however, there was no evidence that the December 1984 conveyance was followed by the issuance of stock in that corporation to the grantors, or that such was the fact in

the alleged 1978 transfer. We find no evidence that the Andersons received anything of value for the conveyance to Louisburg Grain Co., Inc.

The sixth badge of fraud is the consummation of the transaction contrary to normal business procedures. The trial court found that even though plaintiffs presented expert testimony that the "estate plan" of the Andersons was faulty and fraught with difficulties, it was unable to conclude that the transfer was contrary to accepted business practices. The transfer of property by stockholders to corporations, and the subsequent transfer of stock in that corporation to children of the transferors is not, absent other circumstances, an unusual business transaction.

However, we must look at the obvious effect of the transfers. Whether the Andersons were acting in accordance with a well-thought-out or a faulty estate plan makes no difference here. The purpose of such an estate plan is to pass property on to one's children. The Andersons attempted to do just that. They conveyed property - their most valuable assets - to corporations which they owned and controlled. This effectively placed the land beyond the reach of their personal creditors, at least for the time being, and it removed the property from the reach of personal judgment liens. Then, by the simple expediency of stock transfers, the asset value was transferred to their children. An estate plan cannot be used to hinder, thwart, delay or defraud

creditors. The execution of the "estate plan" by the Andersons had just that effect.

Assume that a debtor, acting on legal advice as to an estate plan, conveyed most of the debtor's property to his or her children, leaving the debtor with insufficient assets to pay debts which were reduced to judgment within a few days of the transfer. No court would hesitate to find the transfers fraudulent. The use of a closely held corporation between the debtor and the debtor's children should not alter that finding.

The evidence of fraud was overwhelming. Both of the transfers by the Andersons came after suit was filed. One transfer was made when judgment was imminent, the other after

judgment. Both were made when it appeared that Ketterman would no longer be in a strong financial position. Plaintiffs presented strong evidence of fraud, and that evidence was not rebutted. The judgment of the Court of Appeals affirming the district court is reversed. The judgment of the district court is reversed and remanded with directions to enter a judgment for plaintiffs in conformity with this opinion.

Supreme Court, U.S.
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MAY 11 1989
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No. 88-1658

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

LOUISBURG GRAIN CO., INC.,
A. SCOTT ANDERSON
AND E. SYLVIA ANDERSON, Petitioners,

v.

CITY OF ARKANSAS CITY, KANSAS, CITY OF HESSTON, KANSAS, AND SOUTHWEST NATIONAL BANK, WICHITA, KANSAS, Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas E. Ruzicka
Kenneth C. Jones
Watson, Ess, Marshall & Enggas
130 North Cherry, P.O. Box 550
Olathe, Kansas 66061
(913) 782-2350
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the Kansas Supreme Court was given the opportunity to rule upon petitioner's constitutional claims?

2. Whether the Kansas Supreme Court, when presented with "overwhelming" evidence of a fraudulent conveyance, may reverse a trial court's finding that a fraudulent conveyance did not occur?

LIST OF PARTIES AND RULE 28.1 LIST

In addition to the list of parties contained in petitioners' Petition for Writ of Certiorari, respondents City of Arkansas City, Kansas, City of Hesston, Kansas and Southwest National Bank, Wichita, Kansas state that the respondents City of Arkansas City, Kansas and City of Hesston, Kansas are municipalities incorporated under the laws of the State of Kansas and have no parent companies, subsidiaries or affiliates. Respondent Southwest National Bank, Wichita, Kansas has no parent companies, subsidiaries or affiliates.

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STATEMENT OF THE CASE

Respondents City of Arkansas City, City of Hesston and Southwest National Bank ("respondents") brought this action against A. Scott Anderson, E. Sylvia Anderson, Louisburg Grain Company, Inc. and K-M Land Company to set aside the Andersons' fraudulent conveyance of real estate to the two corporations, which were wholly owned by the Andersons. The District Court of Johnson County, Kansas, found that although many elements of the fraudulent conveyance had been established, that the intent of the Andersons in conveying the property was "unknown." Based upon this conclusion, the trial court entered judgment in favor of the Andersons and their corporations.

Respondents appealed the trial court's decision to the Kansas Court of Appeals, which affirmed the trial court, with one of three judges dissenting. Thereafter, the Kansas Supreme Court accepted review of the Court of Appeals Decision and found that "overwhelming" evidence before the Court established that the Andersons conveyed property to their two corporations with the intent to hinder, delay or defraud respondents. In reaching this decision, the Kansas Supreme Court was presented with and considered the entire record which had been presented to the trial court.

Thereafter, the Andersons, K-M Land Company and Louisburg Grain Company, Inc. filed a Motion for Rehearing and Reconsideration with the

Kansas Supreme Court. As part of that motion, the Andersons and the two corporations requested the Kansas Supreme Court to reconsider its decision based upon the following arguments: (1) An "improper scope of review" was used; and (2) the evidence supported the trial court's findings. Conspicuously absent from the Motion for Rehearing was any reference to the constitutional issues now presented to this court.

The Kansas Supreme Court properly denied the Motion for Rehearing. The Andersons and Louisburg Grain Company, Inc. ("petitioners") have now petitioned this court for a Writ of Certiorari, contending that the Kansas Supreme Court's decision violated Due Process.

REASONS WHY PETITION SHOULD BE DENIED

This case presents the general issue of whether the Kansas Supreme Court, when faced with "overwhelming evidence" of fraud may hold, as a matter of law, that a trial court's decision to the contrary should be reversed.

Petitioners frame their objection to the Kansas Supreme Court's decision in constitutional terms, but these objections are merely a subterfuge to conceal their dismay regarding the Kansas Supreme Court's decision on the merits. Perhaps this concealment is best illustrated by the fact that the constitutional issues raised in the Petition were <u>never</u> presented to, nor ruled upon by, the Kansas Supreme Court.

Indeed, the Kansas Supreme Court was presented with all of the evidence presented to the trial court and found that the trial court's decision as a matter of law was not supported by substantial competent evidence. Petitioners have not produced additional facts warranting a re-examination of this issue.

For these reasons, as more fully explained below, respondents request the Petition for Certiorari be denied.

1. Petitioners may not raise constitutional issues in a Petition for Writ of Certiorari which were not presented to the Kansas Supreme Court for determination.

In their Petition for Writ of Certiorari, petitioners suggest to

this Court that they requested the Kansas Supreme Court to rehear and/or reconsider its decision based upon the Fifth and Fourteenth Amendments of the United States Constitution. Significantly, petitioners' due process claims under the Fifth Amendment are wholly without foundation because the Fifth Amendment applies only to the relationship between the federal government and the individual. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. ____, 107 S.Ct. 2971, 2984, n. 21, 97 L.Ed. 2d 427 (1987).

A close reading of petitioner's Motion for Rehearing and Reconsideration reveals that the due process claims were not presented to

the Kansas Supreme Court for determination. Indeed, the petitioners' Motion fails even to mention the Fifth Amendment, the Fourteenth Amendment or the concept of Due Process. Accordingly, the Kansas Supreme Court was not given the opportunity to rule on the constitutional issues now raised in this Petition for Writ of Certiorari.

It has been long established that issues not raised or resolved in the lower court may not first be presented to this court in a Petition for Writ of Certiorari. Patrick v. Burget, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed. 2d 83, 91, n. 5 (1988); Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed. 2d 701 (1976) (per curiam). Petitioners have advanced no

reason why they should be excused from this rule, and respondents submit that the Petition should be denied for the petitioners' failure to comply therewith.

2. The Kansas Supreme Court acted properly in considering all of the evidence presented to it in determining that "overwhelming evidence" establishes that petitioners conveyed property with the intent to defraud respondents.

The Kansas Supreme Court was presented with the entire evidentiary record previously presented to the trial court. Based upon the entire evidentiary record, the Kansas Supreme Court found, as a matter of law, that the trial court was presented with "overwhelming evidence" of fraud and

that the trial court's findings to the contrary were not supported by substantial competent evidence. City of Arkansas City v. Anderson, 243 Kan. 627, 638, 762 P.2d 183 (1988).

As to petitioners' Due Process claims, it is well established that the Kansas Supreme Court has the power to consider such issues not raised by the parties where such consideration is necessary to serve the ends of justice. State v. Puckett, 230 Kan. 596, 600-601, 640 P.2d 1198 (1982). Petitioners' only complaint is that they were not granted leave to file a brief regarding this issue. Notably, petitioners do not specify what additional facts they could have presented to the Kansas Supreme Court to cause it to find, as a matter of

law, that the evidence supported the trial court's decision. Nor do they suggest that the evidence does not overwhelmingly establish fraud. Petitioners' failure to mention these matters is not surprising, because, all of the facts relating to the fraud issue were presented to the Kansas Supreme Court.

Without unduly burdening this Court with an extensive repetition of all of the facts supporting the Kansas Supreme Court's determination, respondents invite this Court's attention to the following undisputed facts:

1. The Andersons were the owners and sole stockholders of Louisburg Grain Company, Inc. City of Arkansas City v. Anderson, 243 Kan. 627, 635, 762 P.2d 183 (1988).

2. Louisburg Grain Company, Inc. had knowledge of litigation against the Andersons. City of Arkansas City, 243 Kan. at 635.

3. The Andersons were insolvent at the time they transferred the property to Louisburg Grain Company, Inc. City of Arkansas City, 243 Kan. at 635-636.

4. Louisburg Grain Company, Inc. had knowledge that the property transferred to it was the last substantial non-exempt asset owned by the Andersons. City of Arkansas City, 243 Kan. at 636-637.

5. There was no evidence that the Andersons received any consideration for the conveyance to Louisburg Grain Company, Inc. City of Arkansas City, 243 Kan. at 637.

6. The effect of the conveyance was to place, improperly, the Andersons' property out of the reach of their creditors. City of Arkansas City, 243 Kan. at 637-638.

What additional facts and circumstances do petitioners assert to challenge these findings? None. The Kansas Supreme Court, presented with the entire record, determined as a matter of law that the evidence was insufficient to support the trial court's findings. Indeed, the Kansas Supreme Court determined the quantity of evidence establishing fraud to be overwhelming. Petitioners' generalized constitutional challenge to this determination fails to present a certworthy claim.

CONCLUSION

For the above reasons, respondents City of Arkansas City, City of Hesston and Southwest National Bank respectfully ask that the Petition for Writ of Certiorari be denied.

May, 1989 Respectfully submitted,

Thomas E. Ruzicka
Kenneth C. Jones
WATSON, ESS, MARSHALL & ENGGAS
130 North Cherry, P.O. Box 550
Olathe, Kansas 66061
(913) 782-2350

Attorneys for City of Arkansas City, Kansas, City of Hesston, Kansas and Southwest National Bank, Wichita, Kansas

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v.

CITY OF ARKANSAS CITY, KANSAS, CITY OF HESTON, KANSAS, AND SOUTHWEST NATIONAL BANK, WICHITA, KANSAS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

REPLY MEMORANDUM OF PETITIONERS

Paul Hasty, Jr.
Thomas D. Billam
WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHTD.
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000
Counsel for Petitioners

May 16, 1989

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REPLY MEMORANDUM OF PETITIONERS

Respondents in their opposing Brief attempt to rewrite the holdings of this Court in Patrick v. Burget, 108 S.Ct. 1658 (1988), and Youakim v. Miller, 425 U.S. 231 (1976). Respondents state generally at page 7: "... issues not raised or resolved in the lower court may not first be presented to this Court in a Petition for Writ of Certiorari." However, Patrick simply footnotes Youakim by stating: "This Court usually will decline to consider questions presented in a Petition for Certiorari that have not been considered by the lower court."

In Youakim, this Court noted that the general rule was "not inflexible." In fact, the Youakim court stated that circumstances justified the review of

the issue not appealed to the extent of vacating the judgment. Youakim, 425 U.S. at 234-35.

Petitioners strenuously disagree that the issue of due process was not raised below; even though the magic words "due process" were not used in the Motion for Rehearing, Petitioners clearly argued that the Louisburg Grain Co. conveyance was outside the scope of review, and should be allowed to stand as a proper conveyance. (See pages A-26-30.)

Respondents miss the point and argue against themselves by asserting the general rule of Youakim. Respondents specifically advised the Kansas Supreme Court they sought no review of the Louisburg Grain Co. conveyance, but obtained a reversal and a finding of fraud (see A-1, A-2; A-81-82), when

Petitioners had no opportunity to address that issue. These same Respondents now argue, inconsistently and in error, that an issue not raised below in the Kansas Supreme Court should be ignored by this Court.

The Kansas Supreme Court has the power in exceptional circumstances to consider an issue not raised at the trial court or on appeal. State v. Puckett, 230 Kan. 596, 640 P. 2d 1198 (1982), cited by Respondents at page 9. The Kansas Court then cautioned:

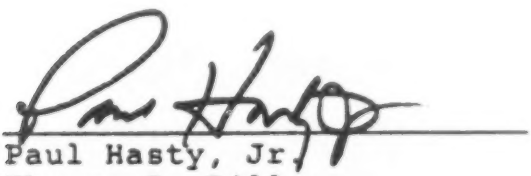
> ". . . where an appellate court raises an issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and to present their positions to the appellate court before the issue is finally determined."

Puckett, 230 Kan. at 601.

When the Kansas Supreme Court forgot its own caution, and instructed a finding of fraudulent conveyance, that Court denied the Petitioners due process.

Petitioners respectfully request that certiorari be granted in this situation.

Respectfully submitted,



Paul Hasty, Jr.
Thomas D. Billam
WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHTD.
P. O. Box 12290
10111 Santa Fe Drive
Overland Park, KS 66212
(913) 888-1000

Counsel for Petitioners

May 16, 1989